IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 4TH AUGUST 2006 / 13TH SRAVANA 1928

CRL.A.No. 1175 of 2003()

AGAINST THE ORDER IN CRLP.151/2003 Dated 01/07/2003
CC.136/2001 of JUDL.MAGISTRATE OF FIRST CLASS-II, KANJIRAPPALLY

.....

APPELLANT(S): COMLAINANT

PHILIP VARGHESE S/O. VARGHESE,
AGED 44 YEARS, MADATHANIKUNNEL HOUSE,
CHERUVALLY P.O., MANIMALA, KOTTAYAM DISTRICT

BY ADV. SRI.T.J.THOMAS

RESPONDENT: ACCUSED

ABRAHM P.EAPEN (BABYCHEN) PULIMOOTTIL
HOUSE, (REEJENCY BUS SERVICE), THOTTACKADU P.O.,
KOTTAYAM.

ADV. SRI.MVS.NAMBOOTHIRY
BY PP SRI.K.J.GEORGE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 04/08/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K. HEMA, J.

CRA. NO. 1175 of 2003

Dated this the 4th day of August, 2006.

J U D G M E N T

This appeal is filed by the complainant against the order of acquittal passed under Section 256(1) of the Code of Criminal Procedure. He filed a complaint against the first respondent, alleging offence under Section 138 of the Negotiable Instruments Act. On 26.04.2003 since the complainant was absent, the court acquitted the accused under Section 256(1) of the Code. The said order is under challenge in this appeal.

2. The impugned order can be extracted as here under:

> "Accused present. Today the complainant is absent, despite the specific order that the case was posted as last chance for his evidence. Seen that the complainant is not interested in prosecuting the case. Hence complaint is dismissed and accused is acquitted u/s. 256(1) Crl. P.C."

It appears from the order under challenge that the accused was acquitted on a day when the case was posted for evidence. The court found that the complainant is not interested in prosecuting the case, since he was absent despite the specific order that the case is posted as last chance for his evidence. Learned counsel appearing for the appellant submitted that this observations made by the court

below are not consistent with the records in this case. He has made available the certified copy of the proceeding sheet and it can be seen from the proceeding sheet that the complainant was prosecuting the case with due diligence. He was present almost all posting dates.

3. For a period of one year from 06.05.2002 to 26.04.2003 there were about 13 postings and complainant was present on all these postings. But the accused had applied to excuse his absence on several occasion during this period. Therefore, it can not be said that the complainant is not interested in prosecuting the case. Though the complainant was absent on 26.04.2003, he filed an application through his counsel to excuse his absence. But the court was not pleased to allow the application and acquitted the accused under Section 256(1) of the Code.

4. On a reading of the Section 256(1) of the Code it can be seen that a court can acquit the accused under the said Section only on two types of days :(i) the date appointed for appearance of the accused in court if summons is issued and (ii) the subsequent day to which the case is adjourned for "hearing". The complainant's absence becomes fatal only on those particular days and not on any other day. The day appointed for appearance of the accused, if summons is issued, falls under Section 251 of Cr.P.C. The subsequent day thereto, to which

the case is adjourned for "hearing" is the day stated in Section 254 of the Code. The court is not expected to acquit the accused on any other day, that too, after evidence is recorded at least in part.

5. It was unfortunate that in a case of this nature, where the complainant is vigilant throughout and he had also filed an affidavit in lieu of chief examination and the case was adjourned for cross examination the court acquitted the accused under Section 256(1) of the Code. The provision under Section 256(1) is not meant for harassing the complainant, who has been vigilant in prosecuting the case. The accused cannot be acquitted invoking Section 256(1) of the Code after evidence has been adduced at least in chief examination. The tendency shown by the Magistrate to acquit the accused at the fag end of the trial for non appearance of the complainant cannot be appreciated.

6. The order under challenge is clearly illegal and is set aside. Trial court is directed to take C.C. No. 136/2001 on file and dispose of the case in accordance with law. Parties shall appear before the trial court on receipt of notice by their respective counsel from the trial court.

This appeal is allowed.

krs. **K. HEMA, JUDGE**